Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	FCC 13-122
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies	WT Docket No. 13-238
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	WC Docket No. 11-59
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	RM-11688 (terminated)
2012 Biennial Review of Telecommunications Regulations	WT Docket No. 13-32

REPLY COMMENTS OF FAIRFAX COUNTY, VIRGINIA

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REPLY COMMENTS OF FAIRFAX COUNTY, VIRGINIA

I. THE TELECOMMUNICATIONS INDUSTRY HAS FAILED TO IDENTIFY ANY REAL NEED FOR THE FCC TO ENGAGE IN THIS RULEMAKING.

The comments from the Telecommunications Industry ("the Industry") reveal that there is no real urgency for the FCC to implement rules either to interpret § 6409(a) of the Middle Class Tax Relief Act ("§ 6409(a)") or to establish specific time parameters to act on telecommunications applications under § 337(c)(7) of the Telecommunication Act. Glaringly absent from Industry comments is any data or comprehensive research demonstrating that local regulatory review thwarts the expeditious deployment of telecommunications infrastructure – either with respect to collocations or initial applications. For example, although PCIA - The Wireless Infrastructure Association ("PCIA") notes that "barriers to infrastructure remain," it wholly fails to specify what those barriers might be, or how local regulatory review is the culprit. PCIA at 5. Ironically, PCIA observes that "[n]umerous states, localities, and courts have already begun implementing Section 6409(a);" nonetheless, despite this admitted widespread willingness to adhere to the law, PCIA still urges the FCC to implement new rules. *Id.* at 28.

Collectively, the Industry comments cite to about a dozen anecdotal incidents where they purportedly encountered problems siting a telecommunications facility, and these are disproportionately from the state of California.[1] It is a far-cry from a widespread or national

[1] City of Albany, California (CTIA – The Wireless Association ("CTIA") at 18, Verizon at 31); City of Baldwin Park (PCIA at 44, n.146); California Coastal Commission (Verizon at 27); City of Campbell, California (PCIA at 44, n.147; Verizon at 31); City of Davis, California (Verizon at 26, n.60); unnamed cities in Georgia (Verizon at 27); Town of Greenburgh, New York (PCIA at 47, n.155, Crown Castle at 15); Town of Hillborough, California (CTIA at 18-19); City of Livermore, California (CTIA at 17, Verizon at 31); City of New Rochelle, New York (PCIA

problem. Moreover, it isn't clear whether the few incidents cited are even true. For example, the acting city attorney for Livermore, California, was surprised that Verizon complained about Livermore in its comments. He stated that Livermore had not denied a Verizon collocation request for several years.[2] Similarly, a city planner for San Francisco also stated that he was not aware of any problems with Verizon. He noted that to the extent that there are problems with collocations, it is from providers failing to install collocations in accordance with what the city had approved, or installing such collocations in a manner that is inconsistent with the building code.[3] In short, it seems that the "difficult and time-consuming process" cited by Industry is either exaggerated, concocted, or of their own making. CTIA at 3.

It must also be noted that Industry comments are devoid of any recognition that local land use regulation serves an important interest. Land use regulation is more than subjective determinations about aesthetics; it promotes the productive and orderly development of a community so that its citizens can live and work in a positive and healthy environment.[4] Industry's comments, however, are premised on the erroneous assumption that land use regulation is nothing more than an impediment to the deployment of telecommunications infrastructure. *See, e.g.*, Verizon at 2 (claiming that "the current regime of wireless siting regulation often delays or impedes" efforts to enhance networks). This utter disregard for the careful balancing of competing legitimate interests should give the FCC pause. As set forth

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at 41, 42, n.138); City of San Francisco, California (Verizon at 31); County of Ventura, California (Verizon at 26-27).

[2] February 14, 2014, telephone interview with Acting City Attorney Jason Alcala.

[3] February 14, 2014, telephone interview with San Francisco City Planner Omar Masry.

[4] The Fairfax County Zoning Ordinance lists 15 separate purposes of its zoning ordinance, including, among others, the reduction of congestion, providing for adequate light and air, adequate transportation and recreational facilities, historic preservation, conservation, and to protect against pollution. Fairfax County Zoning Ordinance § 1-200.

more fully below, in their zeal to expedite infrastructure deployment, the Industry comments misinterpret the narrow directive of § 6409(a) and improperly ignore the express preservation of State and local zoning authority over the siting of telecommunications facilities in § 332(c)(7) of the Telecommunications Act.

II. INDUSTRY COMMENTS IGNORE THE CLEAR AND UNAMBIGUOUS LANGUAGE OF § 6409(a).

Industry's comments summarily conclude that an expansive interpretation of § 6409(a) is necessary to further Congress's stated intent for the rapid deployment of telecommunications infrastructure. Tellingly absent, however, from any of these comments is any direct citation to the statute itself. Apparently lost on these commentators is that although Congress has clearly articulated a plan to expedite the removal, replacement, and collocation of transmission equipment, it has done so in a narrow and measured way. We know from *Chevron* that there is only one way to determine the intent of Congress: the language used in the statute. *See Chevron v. Natural Res. Def. Council,* 467 U.S. 837, 843 (1984) (observing that both the courts and the agency "must give effect to unambiguously expressed intent of Congress."). As set forth more fully below, Industry comments that either ignore this clear language or expand it such that it is no longer recognizable cannot be countenanced.

A. A "Wireless Tower or Base Station" is not a Utility Pole, a Building, or a Structure.

Congress limited the application of § 6409(a) to "wireless towers or base stations." This term plainly connotes a particular type of structure—a tower or base station, and critically, only those that are modified by the adjective "wireless." Section 6409(a), by its very terms, only applies to those structures that were constructed and deployed for the sole or primary purpose of wireless technology. Given that the purpose of § 6409(a) is to expedite *de minimis*

alterations in already existing infrastructure, this language makes sense. Indeed, an "existing wireless tower or base station" has likely already been subject to one round of local review; it is only for minor changes on already existing wireless facilities that Congress has concluded that approval must be given.

Industry, however, urges the FCC to simply ignore this restriction, such that "wireless" is read out of the statute, and virtually any vertical structure can be used to house telecommunications equipment. Under this nonsensical interpretation, Fairfax County would have no ability to prevent a telecommunications carrier from installing transmission equipment on the historic Fairfax County Courthouse or the roof of George Washington's Mount Vernon Estate.

As these photos illustrate, this absurd construction is not what Congress intended. Similarly, including *any* structure within the ambit of § 6409(a), regardless of its purpose, begs the question of whether a telecommunications provider could install transmission equipment on that structure without regard to its underlying purpose. Thus, could transmission equipment be installed on a utility pole such that the underlying utility cannot function, or, more likely, cannot be properly maintained? Frequently, the only way to resolve such competing interests is via local regulatory review—a process that Industry urges the FCC to eliminate.

B. The Word "Existing" Cannot Be Read Out of the Statute.

Industry emphasizes that there is currently a "diverse state of wireless deployment" that includes utility poles, water towers and light stanchions. PCIA at. 31-32. As noted above, because the sole or primary purpose of these structures is for something other than telecommunications, Congress did not intend for them to be included within the ambit of § 6409(a). If, however, the FCC rules otherwise, there is no basis to contend that the placement of telecommunications equipment on such structures *for the first time* is not subject to any review, or only the limited review afforded by § 6409(a). It is one thing to include such structures within the ambit of § 6409(a) *after* they have been reviewed and approved for telecommunications facilities, but quite another to suggest that any installation of equipment on such structures is acceptable as long as it does not substantially change the physical dimension of that structure. Any such interpretation reads the word "existing" right out of the statute.

In addition, § 6409(a) applies only to an "eligible facilities request" (hereinafter "EFR"). That term, which is the only one expressly defined, limits an EFR to transmission equipment that is "removed," "replaced," or "collocated." Each of these terms necessarily means that telecommunications equipment is already present. Industry's comments gloss over this fact, and attempt to bundle all three terms into one – "collocate," and then to modify this term such that it does not mean equipment that is "co-located" with *other* equipment, but rather, is any *de minimis* placement of equipment, regardless of whether other equipment exists. *See, e.g,* Verizon at 28; Wireless Internet Service Providers Association ("WISPA") at 15. This construction creates a hopelessly circular argument in which EFRs, by definition, do not substantially change the physical dimensions of a structure, and as such, they must be approved

because they don't substantially change the physical dimension of the structure. It is clear from the face of the statute that Congress did not intend to construe "collocate" or EFRs in this manner. In short, §6409(a), by its very terms, applies only to those structures that currently house telecommunications equipment.

C. Whether a Collocation "Substantial[ly] Change[s] The Physical Dimensions" of a Tower or Base Station Cannot be Determined via Uniform Rules.

As stated in Fairfax County's initial comments, whether an EFR "substantial[ly] change[s] the physical dimensions" of a wireless tower or base station is not a determination amenable to uniform or "cookie-cutter" rules. Even Industry implicitly recognizes this fact. For example, the Utilities Telecom Council ("UTC") observed that in some instances the FCC's proposed ten percent rule would be too low. UTC at 14. We agree – there well may be some instances when pre-established uniform rules would *exclude* an EFR from the application of § 6409(a). That fact, however, buttresses the argument that the FCC should not attempt to promulgate rules in this area. A one-size fits all approach necessarily means that some EFRs that should be denied will be approved, and as UTC correctly observes, some EFRs that should be approved will be denied. It is not a formula that serves the public interest.

Similarly, at least some Industry commentators recognize that uniform rules that would define "substantial change" only in terms of objective measurements related to height, width, and depth fail to recognize the importance and criticality of stealth features that hide or camouflage telecommunications equipment. *See, e.g.,* PCIA at 38 and 46. Again, the promulgation of uniform rules runs counter to this kind of consideration.

Further, as noted in Fairfax County's original comments, to the extent that any such rules specify height increases, those increases should be measured from an original baseline

rather than in such a manner that would permit unlimited height increases. Many Industry commentators observed the sensibility of this approach. *See, e.g.,* Verizon at 29-30; PCIA at 38.

III. SECTION 6409(a) DOES NOT ADDRESS HOW OR IN WHAT MANNER EFRs ARE TO BE PROCESSED.

Section 6409(a) does not obviate Industry obligations to submit formal applications for EFR approval, negate a locality's ability to impose conditions on such an application, or impose any time limitations on such review. The statute is utterly silent on such issues. Industry comments, however, create out of whole cloth an entirely new regimen that would dramatically limit how or in what manner EFRs may be processed. Industry views § 6409(a) as a blank check that would eliminate all local review of these kinds of applications. Once again, however, Industry ignores the express language of the statute. For example, Industry contends that § 6409(a) *requires* an administrative process, when the word "administrative" appears nowhere in the text of the statute. PCIA at 46.

To the extent that § 6409(a) speaks to such issues at all, it refers to an "eligible facilities *request*." The term "request" necessarily connotes the asking of permission. Accordingly, those comments that urge categorical exclusions, automatic approvals, or the elimination of application requirements should not be considered because, again, they run afoul of the clear and unambiguous statutory language.

Similarly, the word "eligible" necessarily connotes the concept of "lawful." Industry comments seem to suggest that *all* minor modifications of facilities must be approved, but any such interpretation ignores whether those facilities were approved in the first place, or whether even a minor change would render a facility nonconforming or exacerbate a nonconforming condition. *See, e.g.*, PCIA at 43. A tower or structure illegally constructed is not sanitized by § 6409(a). Similarly, modifications that would render a structure illegal or exacerbate an

existing nonconformity cannot be characterized as "eligible." Although arguably, § 6409(a) encourages approvals of collocation requests, it only *mandates* approval when the change is insubstantial. Facilities that are illegal or lawfully nonconforming are simply outside the scope of Section 6409(a).[5] Nonetheless, allowing localities to impose conditions in such situations would have the real benefit of promoting collocations even in such instances. A rule to the contrary will compel localities to simply deny such applications—a result that is in neither side's interest.

IV. THE FCC SHOULD NOT ESTABLISH TIME LIMITS OR A "DEEMED APPROVED" REMEDY UNDER EITHER § 6409(a) OR § 337(c)(7).

A. Industry Fails to Make a Case that Delays are Pervasive.

The Industry comments fail to point to any widespread or systemic delays in the processing of EFRs or telecommunications applications. As noted above, other than isolated anecdotes, the comments when viewed as a whole do not even begin to make the case that local and state governments unnecessarily delay such applications such that a "shot-clock" is even necessary. Nor is there any real consensus on what these presumptive time limits should be. *See, e.g*, WISPA at 10 (60 days for EFRs); Verizon at 31 (45 days for EFRs). Further, even if a rule is to replace the existing guideline from the *2009 Declaratory Ruling*, Industry does not explain why the current 90 day presumption is inadequate.

The Industry comments that support such time parameters express the unsupported conclusion that a particular time limit "should be more than enough time" to process

[5] PCIA blithely contends that excluding legal nonconforming structures will lead to a rush of zoning changes to render existing facilities nonconforming. PCIA at 43. It ignores the lengthy and arduous process to effectuate this kind of comprehensive rezoning, which, in Fairfax County requires extensive notice, advertising, and typically two separate public hearing processes. *See generally,* Va. Code Ann. § 15.2-2204.

an application. WISPA at 10. This bare conclusion, however, gives short shrift to how dramatically different processing an application may be depending on the size of a community, and the number of applications presented to it. Fairfax County, for example, has a population of over 1.1 million people, which is larger than eight states and the District of Columbia. The County processes hundreds of applications per year for telecommunications facilities, among many other additional applications for other types of facilities. Nevertheless, according to Industry, a telecommunications application in New York City must be analyzed within the same time frame as a small town in Iowa. Although one commentator recognized that requiring a uniform *process* would not be appropriate in light of such differences, it had no trouble concluding that the *time frames* for two such disparate communities to process that request should nonetheless be the same. *Id.* In short, the existing presumptive guidelines under the *2009 Declaratory Ruling* are working, and the FCC should not incorporate them into inflexible rules.

B. Congress has not Authorized the FCC to Establish a "Deemed Approved" Remedy Under Either § 6409(a) or § 337(c)(7).

To be sure, even if Industry made a compelling argument in support of even more abbreviated time frames of less than 90 days, which it has not, the FCC is constrained from adopting any rule that would deem either an EFR or telecommunication application "deemed approved" if those time limits were exceeded because Congress has not authorized it. The FCC has already determined that "§ 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction with 30 days." *2009 Declaratory Ruling* ¶ 39. There is no dispute that Congress has not amended § 332(c)(7). Industry, however, urges the FCC to revisit this determination in light of Congress's enactment

of § 6409(a), which it characterizes as "clear congressional intent to facilitate siting decisions through a deemed granted approach." CTIA at 20.

As a preliminary matter, it is important to observe that the "may not deny, and shall approve" language in § 6409 is not synonymous with a "deemed approved" standard. *See* PCIA at 56; CTIA at 19-20. First, the mandate to approve in § 6409(a) is available only in limited circumstances: minor installations on already existing telecommunications facilities that do not substantially change those facilities. Second, any such mandate to approve still requires a locality to take affirmative action, whereas a "deemed approved" standard occurs automatically in the absence of any action. Had Congress intended EFRs to be "deemed approved," it would have used that language; the fact that it did not underscores that no such remedy is authorized or intended.

Industry is overreaching when they contend that Congress authorized a "deemed approved" remedy in § 6409(a). Accordingly, it is similarly overreaching for Industry to then argue that the same standard should exist for § 332(c)(7) so that "[s]uch a discrepancy should be eliminated going forward." PCIA at 56. There is no discrepancy. Both statutes expressly recognize the authority of localities to make these critical land use decisions, and under well settled law, the FCC is not authorized to adopt a "deemed approved" remedy. *City of Arlington, Texas v. Fed. Commc'n Comm'n*, 133 S.Ct. 1863, 1869 (2013) (providing that an administrative agency cannot "go beyond what congress has permitted it to do").

CONCLUSION

Distilled to its essence, the telecommunications industry asks the FCC to solve a problem that does not exist with authority that the FCC does not have. In § 6409(a), Congress acted in a limited way to direct local and state governments to approve minor alterations to existing

telecommunications facilities. Even then, however, Congress was mindful that such approvals are required only when that minor alteration does not substantially change the physical dimensions of the existing facility. Despite what Industry believes to be the intent of Congress, at the end of the day, there is only one way to decipher Congressional intent: statutory language. As set forth in Fairfax County's original comments as well as in this Reply, the rules and definitions urged by Industry simply go well beyond the express language of the statute. Section 6409(a) did not negate or substantially amend almost twenty years of telecommunications law. Indeed, Congress has in no way amended § 332(c)(7). The rules that the FCC is contemplating would adversely impact the ability of local and state governments to balance competing land use concerns with the rapid deployment of telecommunications infrastructure. Fairfax County respectfully asks that the FCC refrain from any rule-making at this time.

Respectfully submitted,

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